THE HIGH COURT OF SOUTH AFRICA
(GAUTENG PROVINCIAL DIVISION, PRETORIA)

Case 24917/22

In the matter between:

LIBERTY FIGHTERS NETWORK	First Applicant
REYNO DAWID DE BEER	Second Applicant

and

MINISTER OF HEALTH	Respondent

and

Case 25363/22

In the matter between:

SOLIDARITY TRADE UNION	Applicant

and

MINISTER OF HEALTH	First Respondent
NATIONAL HEALTH COUNCIL	Second Respondent
DIRECTOR GENERAL, DEPARTMENT OF HEALTH	Third Respondent
NATIONAL DEPARTMENT OF HEALTH	Fourth Respondent

and

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Case 25226/22

In the matter between:

AFRIFORUM NPC	First Applicant
DEAR SA	Second Applicant

and

MINISTER OF HEALTH	First Respondent
THE DIRECTOR GENERAL, DEPARTMENT OF HEALTH	Second Respondent

and

Case 27477/2022

In the matter between:

SAKELIGA NPC	First Applicant

and

MINISTER OF HEALTH	First Respondent
DIRECTOR GENERAL, DEPARTMENT OF HEALTH	Second Respondent
MINISTER OF COOPERATIVE AFFAIRS AND GOVERNMENT	Third Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fourth Respondent

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AFFIDAVIT OF THE MINISTER OF HEALTH

I, the undersigned,

DR MATHUME JOSEPH PHAAHLA

make the following statement under oath.

1 I am the duly appointed National Minister of Health and cited as the respondent in each of the above Applications. I depose to this affidavit in that capacity.

2 I have personal knowledge of the facts to which I depose in this affidavit except where it is apparent from the context that I do not.

3 I am a medical doctor and the scientific facts are within my knowledge by reason of my medical and scientific training and experience.

4 The facts to which I depose are, to the best of my knowledge, true and correct.

THE NATURE AND STATUS OF THIS LITIGATION

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5 On 4 May 2002, in terms of my powers under the National Health Act, 2003 (the "NHA"), I enacted Regulations 16A, 16B and 16C of the Regulations Relating to the Surveillance and the Control of Notifiable Medical Conditions. I did so via GN 2060 in GG 46319.

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6 I refer to Regulations 16A, 16B and 16C as "the impugned regulations" in what follows.

7 I enacted the impugned regulations because I considered them necessary to deal with COVID-19 and the then impending "fifth wave" of COVID-19 infections that was anticipated. I always considered that the impugned regulations were a temporary stop-gap measure to deal with COVID-19 at that time.

8 The applicants in all four of these matters have challenged my decision to do so and seek to have it declared invalid and set aside. By the direction of the Acting Judge President and with the agreement of all parties, these four matters are to be dealt with together and are due to be heard by a Full Bench on an expedited basis on 26-27 July 2022. I am advised that these dates were selected by the Acting Judge President and the parties because (a) this matter would not be ripe for hearing during the second court term; and (b) the week of 25 July was the second week of the third court term and was the earliest available date on which all counsel were available in the third court term.

9 However, as I explain in what follows, events have overtaken this litigation. South Africa has now exited the fifth wave of COVID-19 infections. The impugned regulations have served their purpose and are no longer necessary. Accordingly, on 22 June 2022, I repealed Regulations 16A, 16B and 16C with immediate effect. I did so via GN 2190 in GG 46590.

10 I am advised and submit that this means that the four pieces of litigation are moot. The impugned regulations which were challenged and sought to be set aside have already been repealed and no longer form part of my law. My

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attorneys will therefore write to the other parties and propose that all four matters be withdrawn, with no order as to costs.

11 In any event, even if the litigation were to some extent not moot (which I deny), there is certainly no basis for the matter to heard urgently by a Full Bench.

12 Given the mootness of the matter, I am advised that it is not necessary for me to respond exhaustively to the founding and supplementary affidavits of the applicants at this stage.

12.1 Doing so would unnecessarily burden the court and unnecessarily waste public funds. It would also not be appropriate for me to have to do so on an urgent basis when any urgency has disappeared.

12.2 In the event that there is a debate about mootness, that will need to be adjudicated first and, in the unlikely event that the matter is held not to be moot, I specifically reserve the right to file a further affidavit dealing with the founding and supplementary affidavits insofar as I am advised that this is necessary.

12.3 My failure to do so at this stage must not be regarded as any concession of the correctness of the allegations or contentions contained in those affidavits. Suffice it to say that I deny that any of the grounds advanced by the applicants are sustainable.

13 Nevertheless, I accept that it is desirable and appropriate that I explain to this Court at a high-level the circumstances that led me to enact the impugned

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regulations on 4 May 2022 and to repeal them on 22 June 2022. That is the purpose of this affidavit.

BACKGROUND ON COVID-19

14 I need to begin by explaining how the rates of COVID-19 infection are measured because the measurements together with the particular nature of SARS-CoV-2 virus are critical to understanding the basis for both my decision to promulgate the impugned regulations in the first place and my decision to repeal them.

15 Firstly, the rate of infection is measured by the number of reported cases that occur daily. The reported cases (from all public and private laboratories in the country) are based on the number of PCR and Antigen tests for COVID-19 that are positive. This is referred to as the total COVID-19 case load. The National Institute for Communicable Diseases (NICD) publishes the case load daily on its website.

16 Those reported cases are also expressed as a percentage, which provide a daily "COVID-19 positivity rate". The number of reported cases and the positivity rate are critical measures because they give an indication of the level of transmission though not necessarily the burden of severe disease.

17 The PCR tests do not only determine the existence of the virus but also how much virus is likely in the sample. The existence of the virus is determined by the number of cycles the sample is subjected to in the analytical process. If the virus is identified in less than 38 cycles, the test result is positive and if not detected in over 40 cycles, the result is negative. The actual number of cycles in respect of the sample is expressed as the cycle threshold (Ct) value – the lower the value,

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the higher the viral load. When aggregated nationally, a drop in the Ct value indicates rising viral loads.

18 Another measurement is the number of SARS-CoV-2 RNA copies/ml found in wastewater at any point in time. Pieces of the virus are shed in stool shortly after a person becomes infected - whether with symptoms or not. It has three advantages over calibrating the level of transmission through tests. It gives a clearer image of how much COVID-19 is being transmitted because it does not depend on how many people test – many don't because they are asymptomatic.[1] It also permits an early detection of an increase or decrease in infection because there is always a lag between infection and symptoms leading to testing. It is also a method for identifying new mutations. The samples of wastewater are collected at sentinel sites throughout the country and centrally analysed on a weekly basis by the National Institute of Communicable Diseases and the South African Medical Research Council (SAMRC). An increase or decrease in the number of SARS-CoV-2 RNA copies indicates an early indicator of either the start of a wave or the end of one.

19 All hospitals, whether private or public, report COVID-19 hospitalisations and ICU admissions to the NICD and the reports are collated and published on the NICD website under its Daily Hospital Surveillance (DATCOV) reports and updates. This metric indicates the burden of severe disease.

[1] The trends in both the testing methodology (positivity rates) and the viral load in wastewater are associated. See Renee Street and others "Spatial and Temporal Trends of SARS-CoV-2 RNA from Wastewater Treatment Plants over 6 weeks in Cape Town, South Africa" International Journal of Environmental Research and Public Health Vol 18 Issue 22 17 November 2021.

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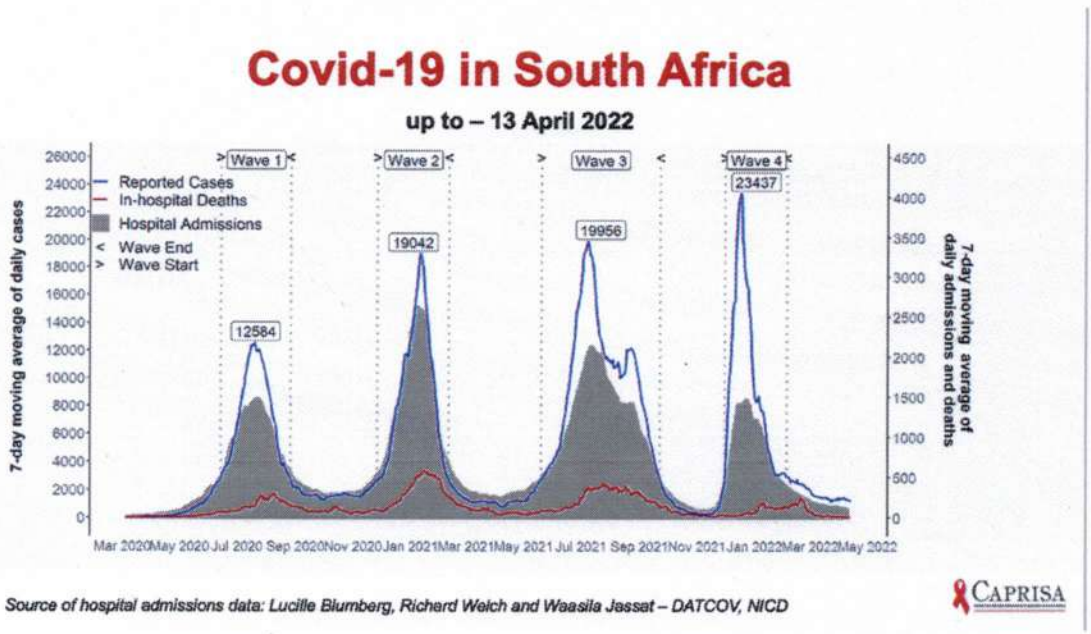
20 An important feature of the SARS-CoV-2 virus is that it mutates into variants that cause new surges and waves of infection. The Beta, Delta and Omicron variants caused the second, third and fourth waves respectively as the graph below demonstrates. It is also a feature of the variants that they differ in respect of their transmissibility and their virulence. Omicron was significantly more transmissible but less virulent than Delta. Although the start of a new wave has become relatively predictable given the current trend, the variant and its transmissibility (hence its rate of infection) and virulence are not.

21 It is also a feature of COVID-19 that reported deaths and hospitalisations increase significantly with each of the waves as the graph below illustrates:



22 It is also an important feature of the COVID-19 pandemic that actual all-cause deaths since the onset of the pandemic significantly exceed the predicted deaths based on the death data for the period 2014-2019, and importantly that the excess deaths mimic the reported COVID-19 deaths in each of the waves as the

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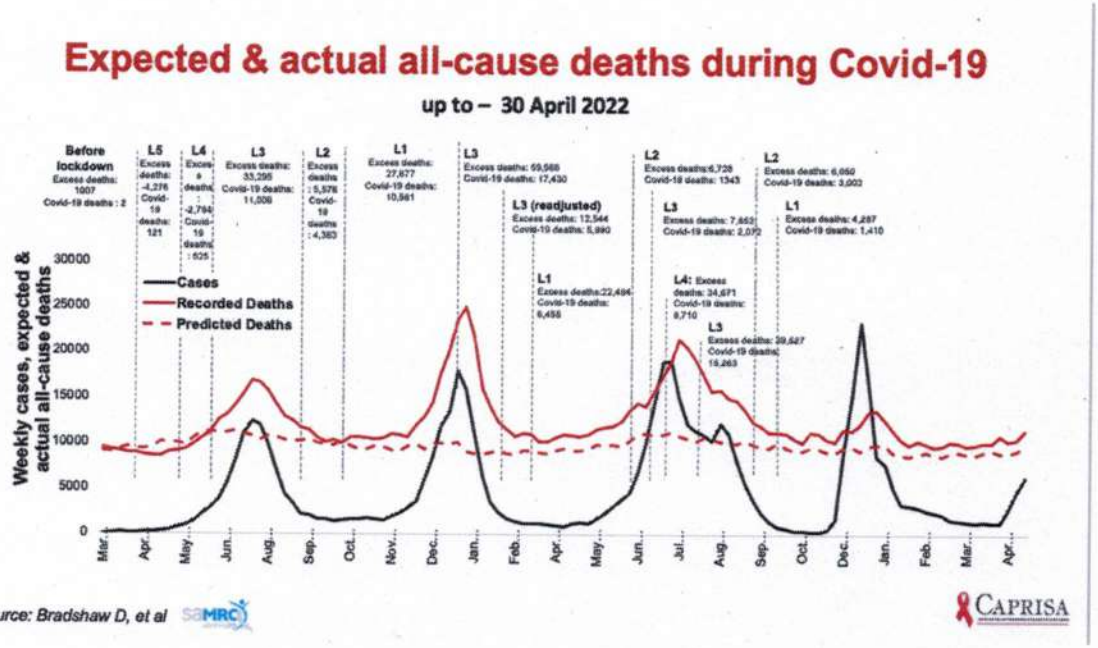
graph below indicates. Accordingly, the number of deaths whether caused directly or indirectly by the pandemic is frighteningly high and as of today amounts to 101 697 Covid-19 reported deaths and 321 300 excess actual deaths.



23 COVID-19 continues to outstrip HIV and TB as a leading cause of infectious death.

24 There is a need for appropriate preventative and mitigation measures to be used, when necessary, to deal with COVID-19 into the future. In this regard, I refer to the expert affidavit of Professor Abdool-Karim, which is filed together herewith.

BACKGROUND TO PROMULGATING THE IMPUGNED REGULATIONS

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25 Regulations Relating to the Surveillance and the Control of Notifiable Medical Conditions ("the Notifiable Medical Conditions Regulations") have been part of our law since 2017 – that is well before the onset of COVID-19 in 2020.

26 On 15 March 2022, I gave notice of my proposed intention to make amendments to the Notifiable Medical Conditions Regulations and invited public comment in this regard. I invited comment for a limited period of 30 days.

27 The need for potential amendments arose from the experience of the COVID-19 pandemic and my concerns about the shortcomings in the existing Notifiable Medical Conditions Regulations.

28 The existing Notifiable Medical Conditions Regulations are structured on the presentation of individual diagnoses and reporting of, and preventative measures for, cases of notifiable medical conditions.

28.1 Accordingly, someone presenting with tuberculosis, would be dealt with individually and if the person refused to isolate, the head of the provincial department of health would have to apply to the High Court for an order for mandatory isolation.

28.2 The existing Notifiable Medical Conditions Regulations are accordingly not structured to deal with epidemics or regional outbreaks of communicable diseases in which large numbers of persons are affected.

28.3 As the 8 February MAC Advisory on Mitigating COVID-19 in South Africa: Going Forward Position Paper (8 February MAC Advisory) stated that

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'COVID-19 has highlighted the need for good infection control practices. The use of masks by the general population has become routine. The provision of N95 masks for use by healthcare workers should be sustained in health facilities to support infection prevention and control. Isolation and quarantine are likely to be required in future epidemics, and all provinces should continue to maintain epidemic preparedness that includes isolation and quarantine facilities that can easily be mobilised when required'.[2]

28.4 It is the experience of the non-pharmaceutical interventions (NPIs) under the National State of Disaster and the range of interventions worldwide[3] that informed both the need and the content of the proposed amendments.

29 During the public comment process, the Department received a number of submissions. One such submission was from the National Economic Development Labour Advisory Council, the membership of which includes the most representative business, labour and community organisations in the country.

29.1 The submission was to the effect that, although the Notifiable Medical Conditions Regulations needed to provide for pandemics and regional outbreaks of communicable diseases and those measures relating to masking and gatherings (together with amendments to the current provisions relating to isolation and quarantine), there were shortcomings

[2] Record: Caseline Page no.020-33.
[3] See the WHO Coronavirus (COVID-19) Dashboard - https://covid19.who.int/measures.

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that required reconsideration particularly because the measures did not fully take into account the different kinds of communicable diseases and the existence of separate health regulatory structures for workplaces under the Occupational Health and Safety Act, 85 of 1993 and the Mine Health and Safety Act, 29 of 1996.

29.2 The submission made was that, given the prospect of further waves of the SARS-CoV-2 virus, a bespoke regulation be promulgated instead to deal specifically with the preventative measures that might be needed to control a further wave of COVID-19 infections and that there should be a triggering mechanism to allow for the activation or de-activation of the regulations depending on the rate of infections and the virulence of the virus.

30 Having taken into account this comment and the number of comments being made, I decided to extend the comment period in respect of the 15 March 2022 draft amendments to the Notifiable Medical Conditions Regulations and instructed the officials in my Department to prepare a tailor made regulation to deal with COVID-19 post the expiry of the State of National Disaster.

THE ENACTMENT OF THE IMPUGNED REGULATIONS

31 The number of reported cases in mid-April were less than 250 cases a day. By 24 April, the figure had risen to 3097 and by 1 May had risen to 4693.[4] This

[4] Based on data produced by the National Institute of Communicable Diseases, the CAPRISA's weekly updates at Caselines Page nos. 020-854, 020-883, 020-916, (Bundle C of the Record reflects these increases: see slide 2 in each of the updates from 1.2 to 1.4.)

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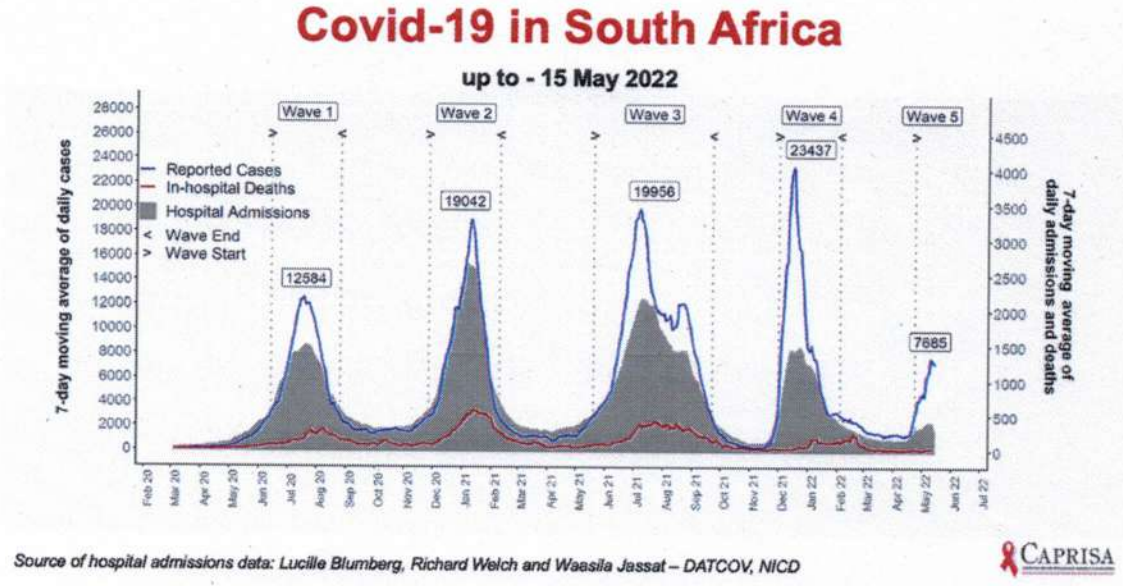
amounted to a 1777.2% increase in reported infections in the space of two weeks preceding my decision to activate the regulations on promulgation. By 15 May 2022 the figure had increased to 7685 reported cases – a 2974% increase. The 5th wave had begun. More disturbing at the time was that there were five sub-variants of Omicron (BA.1, BA.2, BA.3, BA.4 and BA.5) circulating and we did not yet have information on immune escape of BA.4 and BA.5 that appeared to be taking over from the other sub-variants.



Source of hospital admissions data: Lucille Blumberg, Richard Welch and Waasila Jassat – DATCOV, NICD

32 The COVID-19 positivity rates for that period are reflected in the graph below based on the daily positivity rates from the NICD database. The graph demonstrates the start of the 5th wave at the end of April and the beginning of May.

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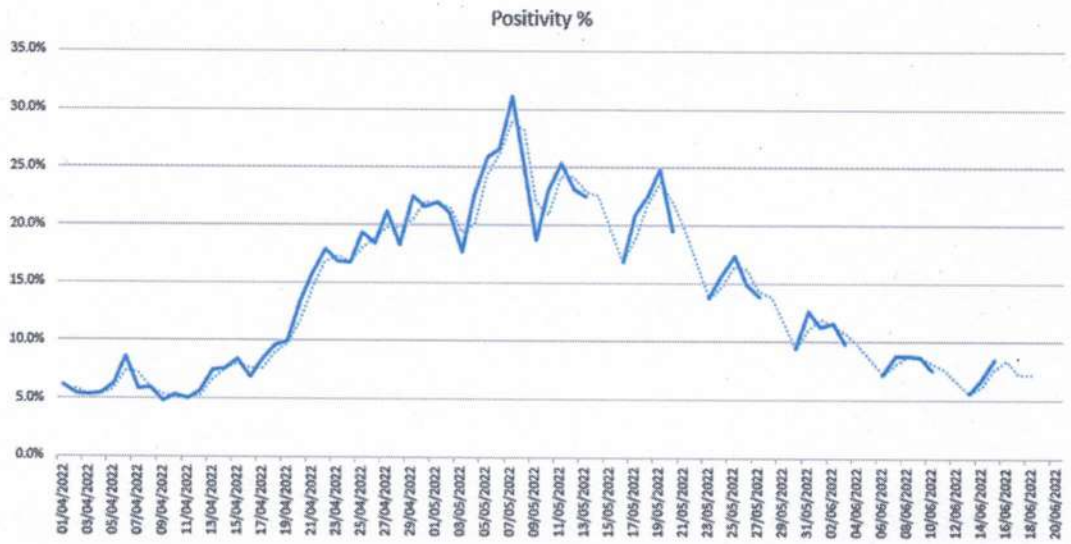
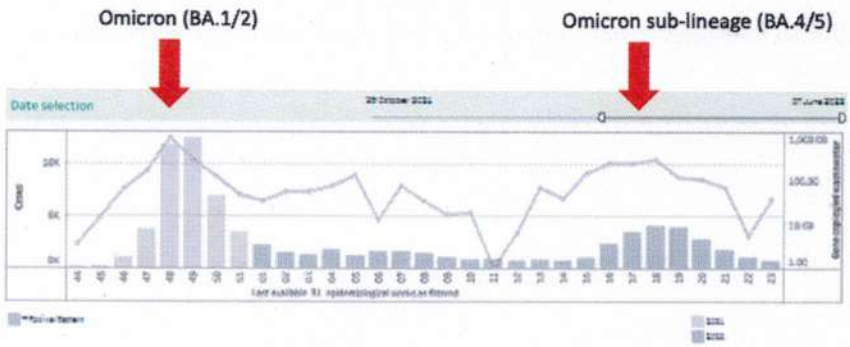


The solid line is the positivity rate from the daily reports. The dotted line is a moving average trend line to fill the gaps where there was no reported positivity value.

33 I have selected a graph in respect of the wastewater levels in respect of the City of Tswane as an example. The graph reveals a disturbing rise in the last two weeks of April and early May and the onset of a new subvariant.

Wastewater levels – 7 October 2021 til June 2022
Rooiwal plant, City of Tshwane, Gauteng Province



Data from NICD SARS-CoV-2 wastewater dashboard https://wastewater.nicd.ac.za/

The solid line reflects the changes in wastewater SARS-CoV-2 results over time. The bars reflect the number of positive cases reported in respect of the locality where the sewage plant is located.

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34 Accordingly, as of 3 May 2022, and having consulted with the Ministerial Advisory Committee and the National Health Council, I decided that, in the face of a steeply climbing infection rate of a variant or sub-variant of yet unknown transmissibility and virulence:

34.1 It was necessary to put in place the preventative measures that were the subject of Regulations 16A, 16B and 16C; and

34.2 The prudent course was to promulgate the impugned regulations with immediate effect.

35 I therefore duly enacted the impugned regulations on 4 May 2022.

36 In view of the fact that the impugned regulations have been repealed and that the matter is moot, it is not necessary to respond to the various allegations in the founding and supplementary affidavits filed by the Applicants. That does not mean that I admit them. Indeed, I strenuously deny them.

37 However, to the extent that the perception has been created that the impugned Regulations were irrational, unjustifiable or not supported by science, it is appropriate to set out at a high-level the reasoning behind the impugned regulations.

38 In this regard:

38.1 I point out first that the deponents to the Founding Affidavits are not experts although they purport to make scientific claims, nor do they put up an expert affidavit to support their claims.

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38.2 Secondly, to the extent that they rely on the MAC advisories and statements in newspapers by scientists, the reliance is selective and do not take into account the time that the statement or the advice was given.

38.2.1 For example, in the context of a mutating virus with varying levels of transmissibility and with waves and troughs, the Applicants rely on statements made in the press by some scientists in respect of the restrictions in the National Disaster Regulations relating to face masks and social distancing restrictions in February 2022. Those statements are based on the after-the-fact experience of the Omicron variant and did not constitute a basis for predicting the form and intensity of the next wave expected two months later.

38.2.2 I had to be guided by the evidence at the time in coming to my decision to keep some of those restrictions in place in the face of an imminent 5th wave of uncertain levels of transmissibility and virulence.

38.2.3 Moreover, the quotations from the text of the advisories and the statements are selective. For example, the 8 February 2022 Advisory on Mitigating COVID-19 in South Africa recommends a shift from containment to mitigation measures in the context of the disaster management regulations. All of its recommendations[5] other than removing testing requirements for cross-border travellers are given effect to in the impugned Regulations.

[5] Stopping contract tracing, quarantine, symptom and temperature screening, decontamination of premises, mandating hand sanitisers and outdoor masks.

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38.2.4 Moreover, there is an explicit recognition in the Advisory that '[a]t this point in time, it is clear that the virus will not be eliminated from South Africa. Although *it is impossible to know the future trajectory of the virus or precisely predict the emergence of new variants*, surges are likely to put less pressure on the health system moving forward. *Over the next few years,* we are likely to reach and endemic state…'. The Advisory then recommends that '[a]s COVID-19 continues to pose a health risk into 2022 and beyond, there is a need to consider responses that are integrated into the health system that are not detrimental to other health needs, and which aim to minimise the extraordinary costs to the macroeconomy'. The impugned Regulations were intended to do just this.

39 I now deal in summary form with the reasons and justifications for each of the impugned regulations.

Regulation 16A

40 The regulation requires the wearing of masks in indoor public places and public transport. The science is clear that there is a significantly higher risk of infection in enclosed congregate settings and that masks, even cloth masks, limit transmission.[6; 7] The fact that masks are less effective against a variant such as

[6] https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-mask/art-20485449
[7] https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public/when-and-how-to-use-masks

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Omicron does not mean it has no effect at all or that it will not be effective against a future variant.

41 While masking in enclosed congregate settings may not become necessary during the troughs between waves and if COVID-19 becomes endemic, it is a public health measure that should be available in case of further waves.

42 The MAC Advisory on 13 May 2022: An Appropriate Response to the Current Upsurge in COVID-19 Cases, states "2. The limited restrictions imposed by the regulations published by the Minister of Health in terms of the National Health Act are consistent with the advice provided by the MAC on COVID-19 in relation to the wearing of face masks indoors." And "Encouraging mask-wearing indoors, and more generally for anyone with respiratory symptoms or at high risk of severe illness, focusing on improved ventilation, and promoting vaccination against COVID-19 are all reasonable and appropriate responses at this time."

Regulation 16B

43 The MAC Advisory on Restrictions on Gatherings recognises that '*COVID-19 is expected to persist globally for years, possibly indefinitely'* and that *'it is inevitable that easing restrictions on outdoor and indoor gatherings will allow for greater transmission of the virus'*. Although it recommends a mitigation strategy rather than a containment one and therefore that reducing restrictions on gatherings will allow society to return to relatively normal functioning, it nevertheless recognises that '[t]he virulence of future variants of SARS-CoV-2 and the degree to which prior immunity will confer protection from severe disease and death are

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uncertain however, *and restrictions on gatherings may be reinstated in the future if necessary to reduce rates of hospitalisations and death attributable to COVID'*.

44 The impugned Regulations distinguish between different kinds of gatherings – each on the basis of the extent with which they may increase the likelihood of transmission of the virus. The first distinction is between indoor and outdoor gatherings. The science is quite clear that transmission is more likely in indoor congregate settings. See the affidavit of Professor Karim in this regard.

45 The second distinction is between large and small gatherings.[8] There is an exponential relation between the numbers attending a gathering and the rate of transmission in the gathering. WHO advises that "The risks of getting COVID-19 are higher in crowded and inadequately ventilated spaces where infected people spend long periods of time together in close proximity."[9] See the affidavit of Professor Karim in this regard.

46 A mass gathering is traditionally defined as a group of more than 1000 persons assembled in a particular location for a specific purpose for a defined period of time in health and medical literature. It is universally accepted that mass gatherings pose significant public health challenges such as transmission of infectious diseases, trauma, dehydration, drug and alcohol use that require legislative and institutional intervention and mass gathering health is now recognised as a separate discipline. Emergency care at mass gatherings is

[8] https://www.cdc.gov/coronavirus/2019-ncov/your-health/gatherings.html
[9] https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public

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already regulated[10] under the Act requiring health and safety measures in respect of mass gathering events of over 1000 persons. The science is that there is a strong correlation between mass gathering events and the transmission of COVID-19.[11]

47 The third distinction is based on the 50% capacity of the venue. That distinction flows from the need to provide for social distancing in gatherings to limit transmission. Social distancing remains a measure to limit transmission in the context of gatherings. Even in the context of an outdoor venue, such as a sports stadium, the difficulty is that people then congregate in toilets, bars etc and so there was a need to limit the numbers concerned.

48 The fourth distinction is between 'planned' gatherings and the random collection of people in any public or private place. The critical element for the distinction is planned gatherings involve a concentration of persons in a single place for the duration of the event. The number and concentration of persons in a single place and the extent of the duration significantly increase the likelihood of infection.

49 The fifth distinction is between those gatherings that have access requirements and those that do not. The reasoning underlying the access requirements of either proof of vaccination or a negative COVID-19 test is that the basic reproductive rate of the virus in large congregate settings is much higher. The science recognises that although the current vaccines do not completely prevent

[10] The Emergency Care at Mass Gathering Event Regulation, 2017 [GN 566, *GG* 40919, 15 June 2017].
[11] https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0256747#pone.0256747.ref001

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transmission, they do reduce the risk of serious illness and death and the viral load of the transmission. See the affidavit of Professor Karim in this regard.

50 It is not correct to label the vaccination access requirement as mandatory vaccination and unfairly discriminating against the unvaccinated. The regulation specifically provides an alternative access requirement in the form of a negative COVID-19 test.

51 The reason for excluding basic education institutions is a result of a risk assessment taking into account the importance of basic education. That assessment is based on the fact that young persons are less likely to be infected and if infected, the illness is less likely to be severe. Moreover, the social and psychological impact on children is high and exacerbated by losing the connection with their peers and educators.[12]

Regulation 16C

52 The regulation requires all international travellers arriving at South African ports of entry to either be vaccinated or produce a negative PCR COVID-19 or antigen test. If the traveller does not meet these requirements, the traveller must undergo antigen testing. If the test is positive and experiencing symptoms, the traveller must self-isolate.

[12] https://www.who.int/europe/activities/considering-the-impact-of-covid-19-on-children

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53 These kinds of requirements have been enforced in most countries at some time or another during the pandemic. They are an important way of dealing with the risk of COVID-19 variants from outside the country.

54 Although these requirements have been relaxed from time to time in many countries, they have been quickly re-introduced under the threat of a new variant. Indeed, those countries that have currently relaxed them often have the legislation in place permitting them to re-impose them.

Quarantine Requirements June 2022	Countries
Home quarantine to all after arrival	9
Information not available	1
Institutional quarantine for some or all	32
Mandatory if coming from X country or unvaccinated	21
No quarantine measure in place	137
(blank)	6
Grand Total	**206**

Testing Requirements June 2022	Countries
Not required	60
Requirement for all	51
Requirement for non-vaccinated	83
Requirement if coming from X country	3
(blank)	9
Grand Total	**206**

Vaccination Requirement June 2022	Countries
Accepted as part of COVID-19 certificate	71
Different rules for nationals/non nationals	1
N/A or no information available	9
Not required	66
Requirement as a condition of entry for most travellers	53
Requirement for some travellers	1
(blank)	5
Grand Total	**206**
WHO	

55 An analysis of the DMA COVID-19 regulations and the NMC COVID-19 regulations demonstrates that the COVID-19 regulations under the NMC were

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intended to mirror the DMA regulations in as far as mask-wearing, the risks of large gatherings and the movements of persons across borders.

THE REPEAL OF THE IMPUGNED REGULATIONS

56 Although there has been a fifth wave of COVID-19 infections, it has turned out to be unexpectedly short-lived and neither as transmissible nor virulent as its predecessors. Although there are differing definitions of when a wave ends, under all of those definitions, it is clear that the 5th wave has run its course.[13] Nevertheless, unlike the troughs in the other waves the positivity rate has not gone below 5% which suggests that the virus has moved to an endemic phase.

57 The number of reported cases has fallen to less than 5 per 100 000 population[14]. The current positivity rate is 5,3%[15].

58 Accordingly, after consultation with the National Health Council, I decided to repeal the impugned regulations because the preventative measures are no longer required to mitigate or contain the COVID-19 virus.

CONCLUSION

59 I therefore respectfully submit that the present matter is moot.

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[13] Professor Karim uses 5 cases per 100 000 population. The NICD uses 30 cases per 100 000 population. The Ministerial Advisory Committee has a more complicated version based on the percentage of the previous wave. But under all three methodologies, the 5th wave has met its nadir.

[14] See slide 3 of the 3 June CAPRISA Update.

[15] NICD figure for 22 June 2022 https://www.nicd.ac.za/latest-confirmed-cases-of-covid-19-in-south-africa-22-june-2022/ .

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60 In the event that the applicants now withdraw their applications, no order for costs will be sought. In the event that they do not do so, I specifically reserve the right to seek costs against them.

CONDONATION

61 In terms of the agreement reached between the parties before the Acting Judge President, the answering affidavit was initially due on 13 June 2022. That date was later extended by agreement between the parties to 16 June 2022 as a consequence of delays in relation to the provision of the Rule 53 record, which had an effect on the timetable as a whole.

62 My legal representatives then requested an extension from the various applicants to 22 June 2022. The need for the extension was occasioned by:

62.1 The extensive supplementary affidavits filed by the various applicants, which total approximately 175 pages excluding annexures;

62.2 The new cause of action introduced by Sakeliga concerning, for the first time, a challenge to the constitutionality of the National Health Act; and

62.3 The late filing of the supplementary affidavit by Liberty Fighters Network, which was filed only on 10 June 2022 instead of 8 June 2022.

63 Of the applicants in the four matters, only the applicants in one matter (the Liberty Fighters Network matter) objected to the extension to 22 June 2022.

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64 However, by the week of 20 June 2022, my provisional view was that it would be appropriate to repeal the impugned regulations, for the reasons I have explained above.

64.1 Between 20 and 22 June 2022, I consulted with the National Health Council, the National Coronavirus Command Council, the President's Coordinating Council and the Cabinet on this score.

64.2 I was advised by my legal representatives that, having regard to the effect that a repeal of the regulations would have, it would be appropriate to file my affidavit only after a decision had been made regarding the question of repeal.

64.3 My legal representatives accordingly requested an extension from the various applicants for two days – from 22 June to 24 June 2022. Of the applicants in the four matters, only the applicants in the Liberty Fighters Network matter and the Afriforum matter objected to this two day extension.

64.4 On the evening of 22 June 2022, the impugned regulations were repealed.

64.5 This affidavit is being filed by 24 June 2022.

65 Insofar as is necessary, I hereby seek condonation for the late filing of this affidavit. I submit that this is justified given that:

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65.1 The delay is relatively slight and still involves a significant truncation of the ordinary time periods applicable to the filing of an answering affidavit under Rule 53;

65.2 The delay is explained above;

65.3 The delay can cause no material prejudice to the respondents and, indeed, the applicants in two of the four matters have offered no objection; and

65.4 Even if the hearing dates of 26-27 July 2022 were still needed (which they ought not to be, given the mootness issue), this affidavit is being filed more than a month before those dates.

DR MATHUME JOSEPH PHAAHLA

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at PRETORIA on this the 24 day of JUNE 2022, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.

COMMISSIONER OF OATHS

SUID-AFRIKAANSE POLISIEDIENS
REGSDIENSTE/KORPORATIEWE BELEIDS-EN
BESTUURSBESTUUR
2022 -06- 24
LEGAL SERVICES GOVERNANCE POLICY AND
LEGISLATIVE MANAGEMENT
SOUTH AFRICAN POLICE SERVICE

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